Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL TIMLEY,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

John P. O'Connor
Counsel of Record
4740 Grand Ave., Suite 300
Kansas City, MO 64112
(816) 292-7000

Patrick W. Peters
Counsel for Petitioner
1125 Grand, Suite 1717
Kansas City, MO 64106
816-474-3600

i QUESTIONS PRESENTED

Summary. A police detective conducted an unofficial investigation of his neighbor, the petitioner. The detective conducted two trash pulls, recovering marijuana residue and a small quantity of marijuana stems and seeds. Another detective applied for and received a search warrant. The affidavit in support of the search contained false and misleading information. The affidavit and search warrant also contained six categories of items to be seized, as it is the policy of the police to include the same six categories in all narcotics search warrants. Marijuana was found during the search.

1. Can a police department create a criminal category exception to the Fourth Amendment requirements of probable cause and particularity, by applying for and receiving thousands of narcotics search warrants that contain the same six boilerplate, general categories of items to be seized, without probable cause?

2. Whether the assumption of *Leon*, that "some magistrates become rubber stamps for the police" but "we are not convinced that this is a problem of major proportions" should be revisited when thousands of narcotics related search warrants prepared by the Kansas City, Missouri Police Department authorized the seizure of the same six boilerplate, general categories of items to be seized, without probable cause?

3. Whether the lower court's have overruled *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) by rewarding police officers who knowingly present false information in an application if a reviewing court can find any basis for the search, and how is such police misconduct deterred without suppression?

II. PARTIES TO THE PROCEEDING

The petitioner, Michael Timley, is a natural born citizen of the United States, and the State of Missouri. The Petitioner was the appellant in the case below. Mr. Timley, petitioner, is an individual, and so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The United States of America was the respondent and cross-appellant in the case below, and has been represented throughout the proceedings by Assistant United States Attorney Brent Powell

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v. OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, which is reported as United States v. Michael J. Timley, Lacey M. Gimlin, 443 F.3d 615 (8th Cir. 2006), is reprinted in the Appendix to this petition. The Eighth Circuit opinion affirmed the denial of petitioner's motion to suppress by the United States District Court for the Western District of Missouri. The District Court adopted the report and recommendation of the magistrate judge, and that report and recommendation is not published, and is reprinted below in the petitioner's appendix.

v. STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit denied rehearing on May 8, 2006. This Court has jurisdiction pursuant to 28, U.S.C. § 1254.

vi. PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST, amend. IV.

Statement of the Case

Petitioner respectfully requests a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Eighth Circuit in this proceeding.

The ruling by the Eighth Circuit creates a *de facto* criminal category exception to the probable cause and particularity requirements of the Fourth Amendment. The opinion finds that evidence of rubber stamping of six categories of items to be seized, without probable cause, is irrelevant. The opinion also states that trash pulls, in which small quantities of marijuana are found, provide sufficient probable cause for the issuance of a search warrant. The opinion approves of search warrants based solely on trash pulls against a backdrop of the submitting police officer's testimony that he believed some judges and prosecutors would not approve search warrants based solely on trash pulls, and his addition of knowingly false and misleading information to overcome this deficiency. The opinion continues the trend of lower courts to use *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) as a basis for rewarding police misconduct.

The Kansas City, Missouri Police Department (KCPD) is one of the largest law enforcement agencies in the nation, serving a population of 450,000 people spread throughout a land mass of 319 square miles. The Kansas City, Missouri Police Department (KCPD) serves four judicial districts: the Clay County, Jackson County, and Platte County Missouri Circuit Courts and the Western District of the Federal District Court of Missouri.

A mere 54 words guarantees citizens the right to be secure in their homes and establishes the constitutional requirements for a search warrant.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4th Amendment, United States Constitution

It is the policy and practice of the KCPD to print both the application/affidavit for search warrant and the search warrant at the same time. In all narcotics related search warrants, both the application/affidavit and the search warrant are printed with the same six boilerplate categories: 1) weapons, 2) currency, 3) any and all equipment used for drug trafficking or to deter the effectiveness of law enforcement, 4) any papers, correspondence or documents, 5) photographs, and 6) indicia of occupancy.

In *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416 (1997), a unanimous Court rejected a criminal category exception to the common law requirement that police officers knock and announce their identity and purpose before entering a dwelling. Nine years later, in *Hudson v. Michigan*, 126 S.Ct. 2159 (2006), a sharply divided Court concluded that a violation of the common law knock and announce requirement did not warrant suppression.

The first two questions presented in this petition go to the heart of the Fourth Amendment: is there a criminal category exception to the Fourth Amendment requirements of probable cause and particularity? The search warrant in petitioner's case, like every narcotics search warrant prepared by the Kansas City, Missouri Police Department, listed six categories to be seized

without probable cause. Issuing judges authorize these search warrants, without modification, even though there is no scintilla of evidence supporting probable cause.

These same six categories appear in every narcotics related application/affidavit and search warrant prepared by the KCPD, irrespective of the variable facts in each search warrant application. For example, in an application based upon an undercover drug buy at an apartment, although the application provides no probable cause or even mention of photographs or documents, the application will request the seizure of all photographs and documents and the search warrant will command that all photographs and documents be seized. In the instant case, over 581 items of legal, innocent personal property were seized, ranging from family photographs to keys to letters from attorneys.[1]

These six categories must meet the constitutional requirements of probable cause and particularity to be included in the search warrant. In the instant case, the evidence presented at defendant's motion to suppress was unchallenged by the government: there was no probable cause contained in the application to support a search for any of the six categories. There was simply nothing in the application that mentioned or suggested probable cause for 1) weapons, 2) currency, 3) equipment to deter law enforcement, 4) documents, 5) photographs or 6) indicia of occupancy.

In addition to the total lack of probable cause, however, four of the categories are so broad as to constitute an illegal, general search in violation of the particularity requirement of the Fourth Amendment. Five

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[1] The Eighth Circuit affirmed the District Court's denial of petitions motion for return of property, even though the government conceded the property was not required as evidence.

reviewing judges—one state circuit judge, one federal magistrate and three appellate judges—found various of these categories to be general. "Equipment used to deter the effectiveness of law enforcement" could be virtually anything: a pager, a telephone, a blanket used to cover contraband. "Documents" is not limited and, in the instant case, the police seized hundreds of documents, including bank statements, bills, and letters to the petitioner from his attorney. "Photographs" is not limited and, in the instant case, the police seized dozens of family photographs. "Indicia of occupancy" is so broad that, according to the detective who prepared the application and search warrant, it would authorize the seizure of anything in the house: food in the refrigerator indicates that someone occupies the house, as does furniture, clothing, and the utilities being turned on.

Unless the Kansas City, Missouri Police Department's policy of a criminal category exception to the Fourth Amendment's requirements of probable cause and particularity is the new law of the United States, overruling *Richards* and every Fourth Amendment case, then the blanket approval by a judge violates the Fourth Amendment.

Rubber Stamp. What quantum of proof must be presented to demonstrate rubber stamping? For a warrant to be valid, "the courts must also insist that the magistrate purport to 'perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *United States v. Leon*, 468 U.S. 897, 914 (1984) (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

The term "rubber stamp" is used to describe "a mostly powerless yet officially recognized body or person that approves or endorses programs and policies initiated by a single specific source." *Merriam-Webster Online*

Dictionary. In the instant case, the issuing judge approved the search warrant containing the six categories, without modification, even though there was 1) no probable cause for any of the six categories and 2) four of the categories did not meet the particularity requirement.

To demonstrate that the issuing magistrate had become a rubber stamp for the KCPD, the defendant introduced every narcotics search warrant presented to the issuing judge by the KCPD. Every search warrant contained the same six categories, without probable cause, and was signed by the issuing judge without modification.

To demonstrate that that the rubber stamped search warrants were "initiated be a single specific source" the defendant and the government presented evidence that every application and search warrant prepared by the KCPD includes the same six categories. The government's witness, Detective Carter, testified that he had prepared about a thousand narcotics search warrants and that they all contain the same six categories.

The petitioner presented empirical evidence regarding search warrants sought by the KCPD through the testimony of an attorney who had reviewed KCPD applications and search warrants. Approximately 1800 search warrants were reviewed and, confirming Det. Carter's testimony, all narcotics related search warrants contained the same categories. Then approximately 200 applications and search warrants were reviewed, word by word, to determine if the application provided probable cause for the six categories. Not a single application provided probable cause for the seizure of weapons. For example, no application stated that a witness had seen a weapon during an undercover buy. Not a single application provided probable cause for the seizure of

documents. For example, no application stated that the suspected drug dealer was seen keeping a ledger, or wrote drug quantities in a notebook. Not a single application provided probable cause for the seizure of photographs. For example, no application mentioned photographs at all, or suggested there might be photographs of drugs or money.

Every judge in the Circuit Courts of Clay and Jackson County, Missouri has authorized a search warrant, without modification, for the KCPD that contains the six broad categories.

The empirical evidence presented by the petitioner and confirmed by Det. Carter's testimony is overwhelming. With the exception of one judge (Judge Stitt of the Circuit Court of Jackson County, Missouri deleted the six broad categories in two or three applications presented to him) every reviewing judge rubber stamped the search warrants sought by the KCPD. Twenty-eight judges in Jackson County, and eight judges in Clay County have authorized searches for the KCPD that include the boilerplate six categories, without probable cause.

The Fourth Amendment commands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

> These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."

Stanford v. State of Texas, 379 U.S. 476, 509-510 (1965).

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016 (1987)

The exclusion of evidence operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, (1974). The "flagrancy of the police misconduct constitutes an important step in the calculus" of excluding evidence. *Dunaway v. New York*, 442 U.S. 200, 218 (1979).

The Kansas City, Missouri Police Department and judges acting at their behest have created a *de facto* criminal category exception to the probable cause and particularity requirements of the Fourth Amendment.

In *Leon*, 468 U.S. at 914 this Court noted that the "calculus" of exclusion also includes the issuing judge. "A magistrate failing to 'manifest that neutrality and detachment demanded of a judicial officer when

presented with a warrant application' and who acts instead as 'an adjunct law enforcement officer' cannot provide valid authorization for an otherwise unconstitutional search' *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327, 99 S.Ct. 2319, 2323-2325 (1979)."

In 1984, at the time *Leon* was authored, this Court opined that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Leon, supra*, 468 U.S. at 916. Unfortunately, twenty-two years later, evidence does exist suggesting judges are ignoring and subverting the Fourth Amendment. The evidence does not simply "suggest" such action: both the government and defendant presented evidence of rubber stamping by every judge—except Judge Stitt—on thousands of search warrants.

The explosion in narcotics related search warrants over the past twenty-two years provides an explanation for such carelessness: instead of reviewing a few dozen applications per year, some judges are now reviewing hundreds, even thousands, of search warrants. (For example, it is not uncommon for a judge in Jackson County, Missouri to "review" and sign over 800 search warrants in a six month period.)

The increased workload of the judges does not provide an excuse for ignoring and subverting the Fourth Amendment. The rubber stamping provides some comedic reading: a search warrant for a suitcase, based upon a sniff by a drug canine, provides probable cause for weapons, currency, documents, photographs and indicia of occupancy. Numerous applications and search warrants authorized no-knock searches due to concern for

officers safety "as enumerated in the application" when no such concerns were listed. Dozens of search warrants authorized the officers to enter without "knocking and embanking their presence" [instead of "knocking and announcing"]. And rubber stamping results in no-knock searches of safety deposit boxes (concern for officer safety in a bank?), suitcases (very, very tiny people inside?), and cars towed to the police garage (people hiding in the trunk?).

This Court has debated whether "there must be a threat of sanction to induce 'resolutely obdurate' trial judges to follow the law" and has stated "we do not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule." *Mickens v. Taylor*, 535 U.S. 162, 173 (2002) (majority opinion of Judge Scalia chiding the dissent of Justice Souter, citing *Leon*, 468 U.S. at 916-917.)

Petitioner does not ask the Court to "presume" anything. Look at the unchallenged record: both the Government and petitioner's evidence shows judges rubber stamping the same six categories, without probable cause, in thousands of search warrants. Petitioner leaves to this Court how to describe the actions of the judges: obdurate, lax, overworked, underpaid, bored? The undisputed fact remains that judges are either not reading the search warrant, rubber stamping the search warrant, or ignoring the 4th Amendment.

Upon the evidence in the instant case, both empirical and direct, can the Supreme Court of the United States state there is "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires the application of the extreme sanction of exclusion"? *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

A search warrant serves two purposes: it describes with particularity the thing to be seized and prevents the seizure of all other items. The particularity requirement "makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, **nothing is left to the discretion of the officer executing the warrant**." *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976), *quoting Stanford v. Texas*, 379 U.S. at 485, 85 S.Ct. at 511.

The policies and procedures of the Kansas City, Missouri Police Department make search warrants an order to search and take anything that, in the officer's discretion, he wants to seize. According to the testimony of Det. Carter, with 1000 searches to his credit, no matter what is listed in the search warrant, the police simply seize whatever they want.

At defendant's motion to suppress, Det. Carter testified that the application contained no probable cause for any of the six, boilerplate categories. (The same detective who filed an affidavit stating that he did have probable cause for the six categories.) Det. Carter also volunteered that, no matter what is listed in the search warrant, **everything** is left to the discretion of the officer executing the warrant. Even when specifically ordered to seize a reasonably particularized item like "weapon", the decision is left to the officer's discretion.

> Q: [A search warrant] tells you what to seize, but it also tells you what not to seize, is that right?
> A: I don't know that it tells you what not to seize. Maybe, you know –
> Q: And the reason you're answering that way is from your testimony, it's clear that it's been your

routine in a thousand search warrants that officers go in and they seize whatever they think is evidence, whether it's in the search warrant or not?
A: Evidence of that crime, yes I would say so. Supp. Trans. Pg 90
Q: Does this description, "any weapons," tell you what you can search for and seize at the residence?
A: This description does tell me any weapons. Does it mean a pocketknife? No. Does it mean hunting rifles? It just depends on the type of hunting rifle. To me, any weapons would mean used in, as evidence of this crime. Supp. Trans. Pg 17
Q: But you have specific things [like marijuana or cocaine] that you're looking for, is that correct?
A: Correct.
Q: And then there's a list of things in addition to that that are put in virtually all narcotics-related search warrants, is that fair to say?
A: Yes, it is.
Q: And the first one that appears is in this search warrant and in ones that have been reviewed is any weapons. First, I want to ask you, there is nothing in your Application that suggests that you had probable cause to believe that a weapon would be found in the house, is that correct?
A: That actually words weapons, no. You' re correct.
Q: Okay. And when you use the phrase, "any weapons," I believe your testimony is that when the officers then go in armed with this search warrant, they pick and choose whether or not they think this particular article or substance is a weapon that you all want to seize?
A: Yes. We make that determination.

Q: And when you're in a house, I believe it's your testimony that the things that we would consider, pretty much universally consider to be weapons, like I think you mentioned a hunting rifle, based on your training and experience there are times when armed with a search warrant that says any weapons, you'll go in and you will elect not to seize the hunting rifle because you don't believe it's connected with the crime, is that right?
A: Yes. That's correct. We've left them.
Q. And you've also had -- they're virtually in every search warrant. You have times where different officers are saying well, should we take this? And one says yeah, I think we ought to and somebody else says no, I don't think we ought to. And in this case you're the person that they ultimately come to, is that fair to say?
A. Yes. Supp. Transcript 95-96

In executing the instant search warrant, over **581 items** of personal effects were seized, based upon categories that the District Court found to be a "fishing expedition." Family photographs, personal letters, bills and receipts, even letters from attorneys were seized. The police simply rummaged through the petitioner's residence, taking whatever they wanted and, at the end of the search, 581 items of personal property were seized, without probable cause, with no suggestion that the items were illegal or indicative of illegal conduct.

Exclusion of evidence is the appropriate remedy. That the six categories included in all KCPD search warrants without probable cause violates the Fourth Amendment is unchallenged. In weighing the social cost of exclusion of evidence, the Courts look to the flagrancy of the violation. The evidence in the instant case demonstrates that the violation is systemic.

Reviewing judges continue to mention the violations, but without exclusion of evidence, the KCPD has no incentive to change its policy. Today, like every other day, the KCPD will request and receive, on average, another 20 search warrants containing the same six categories.

The exclusionary rule applies in "those instances where its remedial objectives are thought most efficaciously served." *Arizona v. Evans*, 514 U.S.1, 11 (1995). In the instant case, Clay County, Missouri Circuit Judge Harman denied the State's application to transfer property to federal court for forfeiture. Although the issue before that court did not include suppression in the federal court, Judge Harman heard the direct testimony of Detective Carter, the author of the instant search warrant (and a thousand other search warrants.) Judge Harman noted:

> This court considers the testimony of Detective Carter significant in that he stated that the items actually seized are left to the discretion of the officer on the scene. According to Detective Carter, items that might be seized could include telephones, answering machines, photo albums, credit card bills, cameras and so forth.
>
> This court cannot articulate exactly what the seizing officers were looking for when executing this portion of the warrant. The phrase, "... and all equipment ... used to deter law enforcement effectiveness" is extraordinarily broad and lacks any degree of specificity. Detective Carter's position would allow officers to determine whether such a

> warrant would authorize the seizure of alarm systems, radios, televisions, computers used by any person in the household, binoculars, automobiles, and on *ad nauseam*. The warrant would allow an officer to decide whether or not to seize telephones, cell telephones, answering machines (used to call a lawyer or record a lawyer's return call? - criminal defense lawyers could certainly deter effective law enforcement.) A defendant's assertion of his Fifth, Sixth, and Fourteenth Amendment rights "deters" effective law enforcement. The Constitution allows for this. It also prohibits general, unreasonable searches.

Page 18-19 of Judge Harman's December 15, 2003 Order

The reviewing federal magistrate noted that the search warrant was a fishing expedition, but found no violation of the law!

> The government should recognize that aspects of Detective Carter's application for a search warrant were, in fact, a fishing expedition. Nothing in his testimony or in his affidavit indicated that, at the time he applied for the search warrant, it was more probable than not that he would find "equipment used to further drug transactions and/or deter law enforcement effectiveness" in defendant's residence. Nothing indicated that he had probable cause to search for photographs. The line item on "indicia of occupancy" is a dangerous one, as well, for cases involving warrants that would not otherwise authorize a search of smaller containers and compartments in a residence. Such evidence

> would be more appropriately obtained by subpoena or subsequent search warrant, rather than as part of an initial search for contraband or fruits of a crime.

Magistrates Second Report and Recommendation.

The three judge panel of the Eighth Circuit Court of Appeals states that evidence of rubber stamping is irrelevant, and approves the practice of including the six categories without probable cause, even though it finds that "indicia of occupancy" authorizes an illegal, general search. The panel stated: "[A] warrant authorizing officers to seize anything related to indicia of occupancy is quite broad. We need not decide this matter, though, for it is inconsequential to the result: the warrant was clearly sufficiently particular as to items seized that formed the basis for the criminal charges."

The social cost of exclusion is low, the benefits great. The exclusion of evidence is a judicially created remedy to deter police misconduct. Last term, in *Hudson v. Michigan*, 126 S.Ct. 2159 (2006), this Court discussed the balance between the social costs of exclusion versus its deterrent effect. In *Hudson*, the knock-and-announce requirement was examined, with a divided Court holding that the social cost of exclusion was too high.

In the instant case, the issue is not merely a common law rule appended to the Fourth Amendment, but the Fourth Amendment itself. "Probable cause" and "particularly describing" are requirements for a warrant. The social cost of thousands of search warrants being issued to the same police department, the wholesale rummaging of personal effects, and the seizure of wholly innocent papers and photographs is high.[2] Every year,

[2] Although not at issue in this appeal, the empirical evidence addresses the true social cost. Nearly a third of the reviewed search

thousands of citizens in Kansas City, Missouri are subjected to 15 police officers storming their home, searching their letters and correspondence, rummaging through their drawers and closets, looking at private photographs, viewing and seizing the most private matters. And this illegal activity is not merely condoned by the issuing court: this illegal activity is ordered by the court.

The cost of exclusion, when balanced against the systemic violation of the Fourth Amendment, is low. One person is not prosecuted. Thousands do not have their Fourth Amendment rights trammeled.

Both Police Officers and Judges Must Follow the Law.

Any reasonably well trained police officer, and any judge reviewing an application for search warrant, must surely know that you cannot search for and seize items without probable cause. If the application for search warrant makes no mention of weapons, currency, documents or photographs, there can be no probable cause to seize such items.

Similarly, any reasonably well trained police officer, and any judge reviewing an application for search warrant, must surely know that a warrant must describe the items to be seized with sufficient particularity that nothing is left to the discretion of the officer. To this day, no police officer or judge can articulate what "equipment used to deter the effectiveness of law enforcement" or "indicia of occupancy" means.

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warrants resulted in no seized evidence of any criminal activity. Over half did not recover any narcotics. The mean quantity of drugs seized was .2 grams, about the quantity of two shakes of a salt shaker.

In *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284 (2004) an ATF agent prepared and signed an application for a warrant with a supporting affidavit, and inadvertently did not include a description of the items to be seized on the warrant form. The officers executing the search limited the search to items contained in the supporting affidavit.

The Court denied qualified immunity to the agent, noting:

> It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. . . . Indeed, as we noted nearly 20 years ago in *Sheppard*: 'The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. . . . Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so"

Groh, 540 U.S. at 564-565.

Knowingly or recklessly stating false information in the affidavit is police misconduct, *per se*, and the social cost of exclusion is insignificant compared to deterring a false statement to a judge, under oath.

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) created a shield for defendants: if a police officer knowingly or recklessly presented false or misleading information to the issuing magistrate in applying for a

search warrant, the government could not then claim that the warrant was valid as issued by a neutral and detached magistrate.

Twenty-eight years later, lower courts, including the 8th Circuit in the instant case, have changed the holding in *Franks*. Although exclusion of evidence is a judicially created remedy to deter police misconduct, *Franks* is now used to simply excise the false or misleading information and uphold the search warrant and admission of evidence.

So, under the revisionist view of *Franks*, when a police officer knowingly presents false information under oath to a judge, there is no remedy to deter his misconduct. Although the false information is under oath, and has been found to be false or misleading by a reviewing court, there is no remedy for the defendant and no punishment for the officer.[3]

The irony of this dichotomy! Suppression is a judicially created remedy to deter police misconduct, with the social cost of suppression weighed against deterring the misconduct. In a case where a police officer is found to have knowingly or recklessly presented a false statement, under oath, the deterrence to such falsehoods would be complete by exclusion, the social cost limited to the single case in which the officer lied.

A mere mortal, like Martha Stewart, is prosecuted and convicted for giving a false statement (not under oath) to an investigator. A police officer, sworn to uphold the law, who provides false information under oath to a judge is

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[3] Although counsel has had many motions to suppress granted due to false testimony by police officers, there are no consequences to deter future misconduct. No officer has been prosecuted for perjury. No officer goes back to the department and says "the judge caught me lying." No prosecutor has asked for a reprimand.

not prosecuted, not punished. Indeed, the Court's reward such perjury if, by happenstance, some non-perjured information can support probable cause.

In the instant case, Det. Carter stated under oath that he had probable cause to seize the six categories mentioned *supra*, while his direct testimony in two court proceedings stated that he did not have probable cause to seize the items. Can any witness make two opposing statements under oath and not face consequences of contempt or perjury?

Det. Carter's false and misleading statements under oath were calculated to circumvent what he knew to be a problem with his search warrant: Det. Carter testified that judges (and prosecutors) are disinclined to approve a search warrant based solely upon a trash pull.

The background giving rise to the instant search warrant is troubling. Michael Timley, a black male, moved into an all-white neighborhood with his white girlfriend. Unbeknownst to Timley, Det. Gibson of the Kansas City, Missouri Police Department Drug Enforcement Unit was a neighbor. Det. Gibson conducted an "unofficial" investigation, ran Michael Timley on the police computer and learned that Timley was on probation for sale of a controlled substance. Det. Gibson then conducted two trash pulls, purportedly finding residue of marijuana in one pull and a tiny quantity of marijuana in the other. There was no other evidence of drug violations.

Det. Gibson worked with Det. Carter. Det. Carter prepared the search warrant application/affidavit and search warrant. Det. Carter knew that judges and prosecutors would frequently not approve a search warrant based solely on trash pulls. Det Carter testified:

> Based solely on trash runs, some judges want more in there than just I received evidence, you know, be it crack cocaine, be it whatever in the trash. Q. And the same with prosecutors, some prosecutors tell you I'm not going to sign off on a search warrant based solely on trash pulls, correct? A. Yeah, some do that. That's correct.

Supp. Transcript Pg. 142

So, Det. Carter simply made stuff up and included it in the application. He did not state that another police officer was a neighbor of Timley's and conducted an "unofficial" investigation. Instead he wrote: "In December, 2002, Detectives from the . . . Drug Enforcement Unit received narcotics information regarding a subject named Michael Timley. The information received stated that Timley, in the past, received large quantities of illegal narcotics and sells the substance in the state of Missouri and the Joplin area."

Det. Gibson was the source of the information, and there was no information from any "source" at any time that Timley had any connection with Joplin or had ever been to Joplin. For Det. Carter, this was not a problem. Det. Carter just made up a Joplin connection:

> On 3-29-2003, at approximately 1300 hours, surveillance was initiated on the residence . . . . A large blue vehicle, license 864-HCS, Missouri, occupied by two unknown black males, backed into the driveway of the residence and pulled up to the garage. The driver and the passenger exited the vehicle and entered the residence through the front door. After a few minutes, the driver partially opened the garage door of the residence, opened the trunk of the vehicle, and pulled two

> large heavy gauge black trash bags from the trunk. . . . A computer check of the license on the vehicle revealed the owner to be Nick Frising, of 3524 Oakridge Drive, Joplin, Missouri.

Once again, Det. Carter claims an investigation, when none occurred. No "surveillance was initiated." Rather, Det. Gibson "unofficially" claims to have seen the large blue vehicle. Unfortunately, Det. Carter and Det. Gibson got caught lying. The license plate does respond to a Nick Frising in Joplin, but Nick Frising is a white male, retired deputy sheriff and coroner, and the license plate remains firmly attached to his 1968 yellow Ford Fairlane. Neither Mr. Frising, or any member of his family, or his vehicle had been in the Kansas City area.

Det. Carter then describes the two trash pulls, and falsely stated in his application what was found. During the first trash pull, according to Det. Carter's affidavit, "a large heavy gauge trash bag, matching the description of the one that was placed in the residence on 3-29-2003 . . . contained numerous green stems and **was full of** a green leafy substance believed to be marijuana." Det. Carter admitted under oath that the large trash bag was not "full of" marijuana, but contained **residue** so miniscule that it could not be weighed. The second trash pull did not contain "a **large amount** of a green leafy substance believed to be marijuana" but a **small amount** (never weighed) of "shake"—seeds and stems.

Det. Carter presented knowingly false and misleading information to the issuing court in his application, under oath, for the benefit of a fellow narcotics officer's neighborhood problem—a black man.

Separate and apart from the variable false and misleading information contained in the search warrant

application, Det. Carter stated under oath, as he has a thousand times, a bold-faced lie. "Affiant and Applicant being duly sworn deposes and states that he has Probable Cause to believe that the above listed property to be searched for and seized . . . is now located upon said described person place or thing . . . ."

Det. Carter claimed, under oath, to have probable cause to seize six categories for which he later admitted, under oath, that he did not: 1) weapons, 2) currency, 3) any and all equipment used for drug trafficking or to deter the effectiveness of law enforcement, 4) any papers, correspondence or documents, 5) photographs, and 6) indicia of occupancy.

CONCLUSION.

Petitioner requests that his writ of certiorari be granted. While divided opinions of this Court have addressed peripheral matters concerning the application of the Fourth Amendment, the issues raised by petitioner go directly to the heart of the Fourth Amendment's basic requirements of a neutral and detached magistrate not acting as a rubber stamp for the police, and the fundamental requirements of probable cause and particularity.

In addition, the issues raised by petitioner do not require this Court to weigh competing evidentiary claims or probe the thoughts of a police officer or magistrate. The evidence presented by the Government and defendant was the same: the same six categories are included in every narcotics related search warrant prepared by the Kansas City, Missouri Police Department, and these warrants are signed, without modification, by judges.

In the history of the republic, there has been no more complete, or damning, record. The petitioner's search warrant was rubber stamped. Every search warrant signed by the issuing magistrate was rubber stamped. And every narcotics related search warrant presented by the Kansas City, Missouri Police Department is rubber stamped.

Respectfully submitted,

John P. O'Connor
Counsel of Record
4740 Grand Avenue, Suite 300
Kansas City, Missouri 64112
(816) 292-7000

Patrick W. Peters
Counsel for petitioner
1125 Grand, Suite 1717
Kansas City, Missouri 64106
(816) 474-3600

APPENDIX

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellant,
v.
Michael J. TIMLEY, Lacey M. Gimlin, Appellees.
United States of America, Appellee.
v.
Michael J. Timley, Appellant.
United States of America, Appellant.
v.
Michael J. Timley, Appellee.
No. 05-1275, 05-1292, 05-1819.

Submitted: Jan. 9, 2006.
Filed: April 3, 2006.
Rehearing Denied May 8, 2006.

Before BYE, HEANEY,and COLLOTON, Circuit Judges.
HEANEY, Circuit Judge.

Michael J. Timley pled guilty to one count of conspiracy to distribute marijuana and one related forfeiture count. He reserved the right to appeal the denial of his motion to suppress evidence seized during a search of his residence. He was sentenced to 92 months of imprisonment, to be followed by four years of supervised release. As to the forfeiture count, the district court refused to order the forfeiture of $130,097 in cash that was seized at Timley's residence, finding that the *Rooker-Feldman* [FN1] doctrine prohibited such action because of a state court ruling denying a motion to transfer the money to federal jurisdiction for the institution of federal forfeiture proceedings. Timley timely appeals, arguing: (1) that the district court erred in denying his motion to suppress and his motion for a *Franks* [FN2] hearing related to that motion; (2) that the government's failure to file a notice of its intent to seek

an enhanced sentence due to prior convictions pursuant to 21 U.S.C. § 851 limited Timley's maximum sentence to 60 months of imprisonment, rather than the 92 months imposed; and (3) that the district court erred in refusing to grant a hearing on Timley's motion for return of his property. The government has cross-appealed, arguing that the district court erred in refusing to forfeit Timley's $130,097, and in failing to include language ordering the forfeiture in Timley's judgment and commitment papers. We affirm in all respects related to Timley's conviction and sentence, but reverse the district court on the forfeiture matter.

FN1. *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

FN2. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

BACKGROUND

In December 2002, Detective Gary Gibson, a neighbor of Timley's, performed a background check on Timley. This revealed that Timley was on probation for a state conviction of distributing and manufacturing a controlled substance and had a prior federal conviction for conspiracy to distribute crack. Gibson passed this information on to Terrence Carter, a detective in the Kansas City, Missouri Police Department's drug enforcement unit. Gibson then continued unofficial surveillance of Timley's house. On March 29, 2003, Gibson saw a blue vehicle back into Timley's driveway. The driver partially opened the garage door, opened the trunk of the car, and unloaded two large black trash bags from the trunk of the car. The driver placed the trash

bags in the garage, closed the garage door, and quickly left the driveway.

On April 9, 2003, Gibson, Carter, and a third detective executed a trash pull at Timley's residence. Upon sorting through Timley's trash, they found eleven bags containing marijuana residue and a large black trash bag similar to the one Gibson saw unloaded at Timley's house on March 29, 2003, which contained green stems and marijuana residue. On April 16, 2003, the detectives conducted another trash pull. This time they observed Timley actually bring the bags to the curb for pick up. In the trash, officers again found what was described as a large amount [FN3] of a substance that appeared to be, and field tested consistent with, marijuana.

> FN3. Timley disputes that officers found a large amount of marijuana because suppression hearing testimony established that it was about an ounce.

Carter then sought a warrant to search Timley's residence. On April 17, 2003, he brought his application to a Clay County circuit court judge. In his application, Carter stated that he had received information that Timley had prior drug convictions, and based on the information outlined above, there was probable cause to search for: marijuana; weapons; currency; any equipment used to further drug transactions or deter law enforcement effectiveness; documents related to drug trafficking; photographs, videotapes, and the like, particularly ones showing coconspirators, assets, or controlled substances; and any indicia of occupancy of the house, including envelopes, bills, and keys. The judge issued the warrant as requested without making any alterations to the form. Carter and his team executed the warrant that same day, seizing, among other things, roughly 100 pounds of marijuana, $130,097 in cash, and numerous documents

and photographs.

Timley was then charged by complaint with conspiring to distribute marijuana. He was subsequently indicted by a grand jury, which charged him with conspiracy to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. § § 841 and 846, and charging that the $130,097 in cash seized from his residence was proceeds of the conspiracy and thus subject to criminal forfeiture under 21 U.S.C. § 853. Pursuant to Missouri law,[FN4] the state sought to transfer the $130,097 its officers had seized to federal custody to accommodate the forfeiture. Timley, through his attorney, Patrick Peters, objected to the transfer. The Clay County circuit court denied the state's motion to transfer, finding that the notice provisions of Missouri's transfer statute were unconstitutional because they did not ensure that interested parties would receive notice of the potential forfeiture, and that, in any event, the state failed to follow even those provisions. The court ordered the money to be returned to Patrick Peters on behalf of his client, Timley.

> FN4. Missouri law requires that a state or local law enforcement agency first receive approval from both the state prosecuting attorney and a circuit judge in the county in which the property was seized before transferring property to a federal agency. Mo.Rev.Stat. § 513.647(1).

Timley then filed a motion to suppress evidence seized during the April 17, 2003 search of his residence, which the district court referred to a magistrate. The magistrate recommended denying the motion, and the district court accepted that recommendation. Subsequently, Timley entered into a plea agreement, by which he agreed to plead guilty to the offense of

conspiracy to distribute marijuana (no specific quantity). The government filed a superseding information charging that offense, as well as a second count charging criminal forfeiture of the seized $130,097. The plea agreement noted that while the conspiracy charge had a five-year maximum sentence, the defendant's prior drug convictions raised the maximum sentence to ten years. The agreement also included the following language:

> Regarding the United States currency described in Count Two of the Information, the parties agree that the $130,097.00 recovered from the defendant's residence on April 17, 2003, are proceeds of the conspiracy to distribute narcotics and forfeitable to the United States government. The defendant agrees to take all steps necessary for this $130,097.00 to be forfeited to the United States government. Specifically, the defendant agrees to obtain the $130,097.00 from the Kansas City, Missouri Police Department pursuant to the court order from the Circuit Court of Clay County, Missouri, and immediately give the $130,097.00 to a representative of the United States government, so the currency may be forfeited. The defendant acknowledges that the United States has instituted criminal forfeiture proceedings against this $130,097.00, and the defendant agrees not to contest this forfeiture proceeding[ ].

(Gov't App. at 40.) Timley, Peters, and an Assistant United States Attorney signed the plea agreement, and it was filed on June 18, 2004. Timley subsequently pled

guilty on June 22, 2004.

On August 16, 2004, the government filed a motion for a preliminary order of forfeiture. Peters objected. According to Peters, he had a fee agreement with Timley for his actions in state court attempting to recover Timley's $130,097, and this agreement entitled him to fifty percent of the money recovered from the state, or an hourly rate of $300 per hour, whichever was greater. Peters noted that he was successful in state court, as the motion to transfer the $130,097 to federal jurisdiction failed. Peters claimed that on June 25, 2003, he filed an attorney's lien on the $130,097 for payment of his fees, and he thus had a third-party interest that precluded the government from effecting forfeiture of the money.

Prior to sentencing, Timley objected to any increase in the statutory maximum sentence that was based on prior convictions. Although the government had, as required by 21 U.S.C. § 851(a)(1), filed a notice of its intent to rely on his prior convictions to increase the maximum penalty when it filed the indictment, it failed to refile the § 851 notice when it filed its superseding information. The district court denied Timley's objection and imposed a sentence of 92 months of imprisonment, to be followed by four years of supervised release.

At the sentencing hearing, the court also considered whether the government was entitled to criminal forfeiture of the $130,097. After reviewing the state court order denying transfer of the money to the United States Attorney, the court found that it lacked jurisdiction to forfeit the money. The court reasoned that "[f]or this court to have subject matter jurisdiction over the U.S. currency for forfeiture, this court would have to find Judge Harman's [state court] opinion and order to be

in error." (Gov't App. at 62.) The court determined that such a review was prohibited by the *Rooker-Feldman* doctrine's strictures on federal courts' power to review state court actions in related proceedings. Accordingly, the court refused to order the money forfeited. The court further held that the money was not forfeitable as substitute property. Both parties appeal.

ANALYSIS

Timley asserts that constitutional and procedural infirmities in the search warrant rendered the April 17, 2003 search invalid, and argues all evidence seized must be suppressed. He further contends that his motion for return of property was improperly denied, and that his sentence exceeded the statutory maximum for his crime because the government failed to file a notice of its intent to increase his sentence based on prior convictions. In its cross-appeal, the government asserts that the district court erred in both failing to state in Timley's judgment and commitment papers that he shall forfeit the $130,097 (or substitute assets) and in failing to order the money forfeited.

I. THE LEGALITY OF THE APRIL 16, 2003 SEARCH

Timley's search-related arguments are essentially three-fold: (1) that the search was invalid because it was based on a general warrant, which the Kansas City police department mechanistically requests and receives; (2) that he was improperly denied a *Franks* hearing on the issue of falsities in the warrant application; and (3) that the warrant was issued in violation of Missouri's statutory filing requirements.

We first address Timley's claim that the evidence

seized must be suppressed because it was based on a warrant that was unconstitutionally broad. "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except for one 'particularly describing the place to be searched and the persons or things to be seized.' " *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (quoting U.S. Const. amend. IV). A warrant that fails in this particularity requirement is invalid, *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), and evidence seized for no reason other than reliance on invalid portions of a warrant must be suppressed, *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir.1983) (en banc). However, where the warrant is invalid only in part, the warrant is "severable," and items seized pursuant to valid portions of the warrant need not be suppressed. *Id.*; *see also United States v. Krasaway*, 881 F.2d 550, 553 (8th Cir.1989) (holding that although portions of a warrant were invalid because they did not describe items to be seized with sufficient particularity, the defendant's motion to suppress was properly denied because the actual items seized fell within the valid portions of the warrant).

Timley argues that his warrant was unconstitutional because it directed the seizure of items for which there was no probable cause to believe were connected to any of his purported criminal activity, and because the warrant was insufficiently specific in directing the items to be seized. [FN5] Timley posits that the warrant must be overbroad because it resulted in the seizure of over 500 items, most of which were various documents and bills. A warrant's validity, however, is not judged solely by how many items were seized pursuant to it. Rather, the question is whether there was probable cause to seize the items as evidence of criminal activity, and whether the warrant sufficiently directed

officers which items to seize so as to limit their discretion.

> FN5. In his brief, Timley emphatically stresses that the warrant is a general warrant because, by his review, the categories of items listed to be seized in his case are listed in hundreds of narcotics warrants in Kansas City. This obscures the issue because one would reasonably expect most of the categories (drugs, guns, money, items related to drug transactions) to be included in such warrants. The question, rather, is whether probable cause supported the issuance of a warrant to seize those items *in this case*, and whether the items were described with sufficient particularity *in this case*.

For most of the categories of items to be seized, we find the warrant valid. The first three categories of items to be seized were marijuana, weapons, and currency. Given that the warrant was based on probable cause to believe Timley was dealing marijuana, directing the seizure of these items was entirely appropriate. Moreover, equipment used to further drug transactions, documents relating to drug transactions, equipment used to deter law enforcement effectiveness, and photographs of coconspirators or objects of the conspiracy are also reasonable, and the warrant was sufficiently particular as to these items. The only questionable item is the warrant's authority to search for matters generally related to indicia of occupancy. We acknowledge that indicia of occupancy is material in cases where the allegation is that the defendant stores the drugs at his or her residence. On the other hand, a warrant authorizing officers to seize anything related to indicia of occupancy is quite broad. We need not decide this matter, though, for it is inconsequential to the result: the warrant was clearly

sufficiently particular as to items seized that formed the basis for the criminal charges. Thus, if there was any error in failing to suppress some of the evidence seized that related to indicia of occupancy, it was harmless. *See* Fed.R.Crim.P. 52(a).

Timley's next claim is that the district court abused its discretion in failing to grant him a *Franks* hearing. A defendant is entitled to such a hearing if he "makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in the warrant affidavit," and "the allegedly false statement is necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Most of the statements alleged by Timley to be false or misleading concern Detective Carter's failure to state in the warrant application that it was Detective Gibson, rather than simply a concerned citizen, who was watching Timley and ran a background check on him. This does not establish an entitlement to a *Franks* hearing. We fail to see how inclusion of Gibson as the source of some background information affects probable cause. On the contrary, the application as it was submitted lists no source for that information, putting the source in the same category as an anonymous tipster. If the tipster was known to be a detective trained in surveillance techniques and familiar with drug trafficking, his information would likely be given more weight by a magistrate than if the tipster was unnamed. *Accord Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (recognizing that the weight to be given to an informant's tip changes based on the totality of the circumstances because "[i]nformants' tips doubtless come in many shapes and sizes from many

different types of persons").

Secondly, even without any of the information from Gibson, there were enough facts before the magistrate to support issuance of the warrant. Specifically, there was evidence of two trash pulls, conducted within a week of one another, and which yielded small and large bags containing marijuana and residue. As Timley recognizes, our court "appears close to a blanket [exception] holding that trash pulls, standing alone, provide probable cause for the issuance of a search warrant in all cases." (Def. Br. at 40.) In *United States v. Briscoe*, 317 F.3d 906, 907-08 (8th Cir.2003), our court was faced with the question of whether there was probable cause for issuance of a warrant based solely on a trash pull that yielded forty marijuana seeds and twenty-five stems. We held that there was, recognizing that possession of marijuana seeds was criminal under both federal and state law. *Id.* at 908.

Similarly here, the trash pulls established probable cause to believe Timley, or someone else at Timley's residence, was engaged in distribution of marijuana. One trash pull revealed eleven baggies with marijuana residue on them, leading to the inference that marijuana had been or was being packaged for distribution. Moreover, on the other trash pull, officers found a quantity of marijuana in a large trash bag, leading to an inference that marijuana had been transported in that bag and that it was more than a user quantity. As in *Briscoe*, distribution of marijuana is both a federal and state crime. 21 U.S.C. § 841(b)(1)(D); Mo.Rev.Stat. § 195.211. Because probable cause supported the warrant's issuance even without the challenged portions of the supporting application, we find no error in the district court's denial of a *Franks* hearing.

Lastly, Timley asserts that the evidence must be suppressed because officers failed to follow the procedural mandates of Missouri law in obtaining the warrant. Specifically, he notes that Missouri law deems warrants invalid if the written application accompanying it is not "filed and verified," as required by Missouri Statute section 542.276(10)(2), and alleges that the written application was never actually filed in this case. "Evidence seized by state officers in conformity with the Fourth Amendment will not be suppressed in a federal prosecution simply because the underlying search warrant failed to conform to state law." *United States v. Dishman*, 377 F.3d 809, 811 (8th Cir.2004); *United States v. Hornbeck*, 118 F.3d 615, 617 (8th Cir.1997).

Our circuit has suggested that, in some circumstances, principles of comity may favor federal courts excluding evidence seized by state officers in violation of state law. *See, e.g.*, *United States v. Eng*, 753 F.2d 683, 686 (8th Cir.1985). We have also held, however, that a procedural violation of state or federal law in securing a warrant ought not result in suppression of the evidence unless the law was either deliberately violated, or the defendant was prejudiced by the violation in the sense that absent the violation the search may not have occurred. *United States v. Freeman*, 897 F.2d 346, 349 (8th Cir.1990).

Assuming a violation of Missouri's state law occurred here, the technical irregularity does not warrant suppression. Timley complains that the application supporting the warrant was never actually filed, which we assume is true. There is no question, however, that it was presented to a magistrate for a determination of probable cause. As such, Timley was not prejudiced by the violation. Moreover, the district court accepted Detective Carter's testimony at the suppression hearing

that he did not realize that failing to file the warrant application was a violation of state law. This is not a case in which officers flagrantly disregarded state law on the view they could simply seek a federal prosecution and ignore state law. Thus, while in an appropriate circumstance suppression may be warranted in a federal prosecution if the evidence shows state officers purposely subverted state law, this is not such a case. We therefore affirm the district court's denial of Timley's motion to suppress.

II. TIMLEY'S RULE 41(g) MOTION FOR RETURN OF PROPERTY

Timley moved the district court for an order directing the return of property seized during the April 16, 2003 search. The district court denied the motion without a hearing, reasoning that a hearing was unnecessary because "[t]he evidence that defendant seeks to introduce in support of this motion is precisely the same as the evidence defendant has introduced or attempted to introduce in support of his motion to suppress." (Def. Addendum at 138.) Timley appeals the denial of his motion and the court's refusal to permit him a hearing on the motion.

Federal Rule of Criminal Procedure 41(g) states that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return," and requires the court to hold a hearing on "any factual issue necessary to decide the motion." Where there is a fact dispute regarding who has custody or is entitled to possession of the subject property, the court must hold a hearing to determine those issues. *United States v. Felici*, 208 F.3d 667, 670 (8th Cir.2000); *United States v. Burton*, 167 F.3d 410, 410-11 (8th Cir.1999).

The defendant's position on this issue is far from clear. He contends that the district court erred by denying his motion without a hearing because he was unlawfully deprived of over 580 items seized by the government. Yet he concedes that most, if not all, of these items have been returned by the government. He also asserts that the government seized three of his vehicles that were not listed in its inventory of the April 16, 2003 search, and is holding them for no reason, entitling him to a hearing on the question of whether he can get them back.

We find no error in the court's refusal to hold a hearing on the Rule 41(g) motion. Timley's motion for return of property did not mention any vehicles, nor did it state any basis for the motion other than that the subject property was seized illegally-a notion the district court already dispelled. Because the district court had already disposed of all issues regarding the legality of the search and seizure in dealing with Timley's suppression motion, and because the vehicles were not specifically mentioned in the motion, there was no need for the court to have a hearing on whether Timley had a right to have the vehicles returned. Moreover, the government, by way of a letter to the Kansas City, Missouri police department, has authorized the return of Timley's property, obviating any need for a hearing on the matter.

III. IMPROPER NOTICE OF INTENT TO RELY ON PRIOR CONVICTIONS

Timley contends that his sentence cannot stand because it exceeded the maximum statutory sentence available for his offense. Timley's offense of conviction has a maximum penalty of five years, unless the defendant has been convicted of a prior felony drug

offense, whereupon the maximum penalty is ten years. 21 U.S.C. § 841(b)(1)(D). Pursuant to 21 U.S.C. § 851(a)(1), a defendant's sentence may not be increased by reason of his prior convictions unless the government files a written notice of its intent to rely on those convictions prior to entry of the defendant's guilty plea.

In this case, the government filed a § 851 notice as a part of Timley's original charges of conspiracy to distribute 100 kilograms or more of marijuana. Timley then entered into a plea agreement, by which he pled guilty to the lesser offense of conspiracy to distribute marijuana with no charged amount. The plea agreement contained the following language:

> The defendant understands that the maximum sentence which may be imposed for the charge to which he has agreed to plead guilty is not more than five (5) years of imprisonment, a $250,000 fine, not less than two (2) years of supervised release, and a $100 mandatory special assessment. Due to the defendant's prior drug convictions, however, the maximum sentence which may be imposed is not more than ten (10) years imprisonment, a $500,000 fine, not less than four (4) years of supervised release, and a $100 mandatory special assessment.

(Gov't App. at 31-32.)

Pursuant to the plea agreement, the government filed a new, superseding information charging Timley with the lesser offense. It did not, however, refile the § 851 notice of its intent to rely on Timley's prior convictions to increase his statutory maximum sentence.

Timley argues that this failure limits his sentence to five years, the maximum sentence available without using his prior convictions.

To accept Timley's argument in light of his plea agreement, our court would have to hold that a defendant cannot waive receipt of proper § 851 notice. In other words, we would have to hold that § 851 is a jurisdictional matter, such that the failure to file proper § 851 notice deprives the court of jurisdiction to impose an increased sentence. Presented with that option, our court has specifically declined to accept it. *See United States v. Mooring*, 287 F.3d 725, 727-28 (8th Cir.2002) (finding that a defendant's stipulation to receiving proper § 851 notice effectively barred the defendant from challenging that issue on appeal). Instead, we reasoned that notice may be sufficient where a defendant had received "the protections intended by the statute," by receiving notice of the prior conviction, the effect it would have on the maximum sentence, and an opportunity to dispute the conviction. *Id.* at 728; *accord United States v. Curiale*, 390 F.3d 1075, 1077 (8th Cir.2004) (per curiam) (noting that in considering whether the defendant received proper § 851 notice, "courts are careful not to elevate form over substance"). Furthermore, we have concluded that "the government is not required to refile a notice of enhanced sentence under 21 U.S.C. § 851 after the return of a superseding indictment." *United States v. Kamerud*, 326 F.3d 1008, 1014 (8th Cir.2003).

Given the above precedent, the government's failure to refile the § 851 notice in this case cannot lead to reversal of Timley's 92-month sentence. First, it is very clear from the plea agreement that Timley understood that his sentence would be increased due to his prior convictions, and he agreed to that by operation of signing the document. Moreover, a § 851 notice was

filed in this case; it was done with the original charge, but not refiled with the superseding information. Under *Kamerud*, refiling of the notice is not required when a superseding indictment is filed. 326 F.3d at 1014. A superseding indictment and a superseding information are of the same nature; they both charge the defendant with a felony offense. The only difference is that the prosecution may file an information instead of an indictment where the defendant agrees to waive formal indictment. Fed.R.Crim.P. 7(b). It would be incongruent to hold that the government need not refile the notice for a superseding indictment, but that it must refile the notice for a superseding information. Thus, we find no reversible error attached to the failure to refile the § 851 notice.

IV. FORFEITURE ISSUES

Lastly, we consider the proper disposition of the $130,097 in cash that the Kansas City police department seized and the federal government seeks to forfeit. The district court held that it was not empowered to forfeit the money because of a competing, contrary, state court ruling on the matter. The court thus ordered the money to be released to Patrick Peters, Timley's lawyer, as payment for Peters's services on state court matters related to the $130,097.

Missouri has established a procedure for instituting state forfeiture proceedings, see Missouri Statute section 513.607, as well as a procedure for transferring property seized by state agents to federal agencies for the purpose of instituting federal forfeiture proceedings, see Missouri Statute section 513.647. In this case, Clay County authorities attempted to transfer the $130,097 seized from Timley to the federal government for federal forfeiture proceedings in lieu of

instituting state forfeiture proceedings. Timley objected. The Clay County circuit court held that the statute under which transfer was attempted was unconstitutional because it did not provide Timley with sufficient notice of the transfer, and further held that the County's attempt to apprise Timley of the transfer by sending notice to his home address when the County knew he was in jail made the notice ineffective. Thus, the Clay County circuit court ordered the $130,097 returned to Peters for him to hold for Timley's benefit.

When Timley entered into a plea agreement on the instant offense, he agreed to plead guilty not only to the conspiracy charge, but to plead guilty to the criminal forfeiture. He specifically agreed that "the $130,097.00 recovered from the defendant's residence on April 17, 2003, are proceeds of the conspiracy to distribute narcotics and forfeitable to the United States government," and that he would "take all steps necessary for this $130,097.00 to be forfeited to the United States government." (Gov't App. at 40.) When the court took up the issue of the forfeiture, however, Peters objected on his own behalf. He claimed that he had a valid third-party interest in the $130,097, because Timley agreed to pay him out of that money for his attorney's fees if Peters successfully kept the state from transferring the money to the federal government. Peters also maintained that to order the federal forfeiture of money that the state court did not allow to be transferred to the federal government would violate the *Rooker-Feldman* doctrine's prohibition on attacking final state court judgments through federal suit. The district court held that Missouri state courts were the first to obtain jurisdiction over Timley's $130,097 as evidenced by its motion to transfer the money to the federal government. It further held that the *Rooker-Feldman* doctrine precluded the court from forfeiting the money, since this would effectively negate

the circuit court's order that the money could not be transferred to the federal government.

Peters first argues that we are barred from considering this matter because the federal courts have never asserted jurisdiction over the *res*. "Traditional forfeiture law makes the *res* the principal focus of the action." *United States v. $12,390*, 956 F.2d 801, 803 (8th Cir.1992). It is "well-settled law that only one court may have jurisdiction over the *res* in an *in rem* proceeding, and therefore the first court to obtain *in rem* jurisdiction maintains it to the exclusion of all others, whether that court be state or federal." *Madewell v. Downs*, 68 F.3d 1030, 1041 n. 13 (8th Cir.1995). However, under conventional rules of *in rem* jurisdiction, once the *res* has been distributed, the deciding court no longer has jurisdiction over it. *$12,390*, 956 F.2d at 804. This case differs slightly from traditional forfeiture law because it is an *in personam* proceeding against the defendant, not his property. *See* 21 U.S.C. § 853(a) (making the defendant's property subject to forfeiture); *United States v. Lester*, 85 F.3d 1409, 1412-13 (9th Cir.1996) (stating that only the defendant's property is subject to forfeiture). Still, where, as here, the state court has ordered return of the *res* to the defendant, that court no longer has any, let alone exclusive, jurisdiction over the *res*. Thus, once the *res* is returned to the defendant, the federal court is not barred from seeking to forfeit it.

That does not end the matter. We next must consider whether the district court lacked subject matter jurisdiction because of operation of the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine acts as a jurisdictional bar, such that federal courts are not permitted to reconsider matters finally decided by state courts. *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir.2000). This rule not only prohibits

"straightforward appeals," but also federal court review of matters "inextricably intertwined" with state court rulings. *Id.* at 492-93. "A general federal claim is inextricably intertwined with a state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it.' " *Id.* at 493 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring)).

Reviewing the record in this matter, we find nothing in the *Rooker-Feldman* doctrine that would prohibit the federal forfeiture. It is true that the existence of a state court ruling affecting the $130,097 certainly complicates matters. Central to the state court's ruling, however, was its refusal to transfer the $130,097 to the federal government because Missouri's transfer statute was unconstitutional and because the state in this case gave Timley insufficient notice of its intent to transfer. Obviously, the federal court is not permitted to reconsider those rulings, but that does not strip the court of jurisdiction altogether; the court remains free to consider matters not intertwined with the state court ruling. The court here was not asked to reconsider the constitutionality of Missouri's transfer statute, as the money was no longer in state custody at the time of the federal forfeiture proceedings. Rather, the question before the federal court was whether the money seized was subject to federal forfeiture, a matter the state court did not address.

Timley is not objecting to the forfeiture; in fact, he has agreed to assist with it. Rather, it is Peters who claims a third-party interest in the $130,097. His third-party interest cannot defeat the federal forfeiture, since the government's interest in the property to be forfeited "vests in the United States upon the commission of the

act giving rise to forfeiture." 21 U.S.C. § 853(c); *see also* § 853(n)(6)(A) (stating that a third-party claimant's interest in forfeitable property is only valid if such interest vested prior to the time that the acts giving rise to the forfeiture were committed). Peters's third-party claim for attorney's fees, which vested on June 25, 2003, does not give him a legal right to money that was derived from a drug conspiracy that began before that date.[FN6] *Accord United States v. Monsanto*, 491 U.S. 600, 613-14, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (holding that § 853's forfeiture provisions operated with equal force to monies the defendant sought to use to retain a lawyer). The district court's ruling to the contrary was error.

FN6. The charged conspiracy in this case lasted from December 1, 2002 to April 17, 2003.

CONCLUSION

For the reasons stated above, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

C.A.8 (Mo.),2006.
U.S. v. Timley
443 F.3d 615

- 05-1819 (Docket) (Mar. 25, 2005)
- 05-1292 (Docket) (Jan. 27, 2005)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05-1275/1292/1819

United States of America	*
	*
Appellant/Cross/Appellee,	*
	* Appeals from the
	* United States
vs.	* District Court for
	* the Western
	* District of
	* Missouri
Michael J. Timley, et al.,	*
	*
Appellees/Cross-Appellants.	*

The petition for rehearing by the panel filed by appellant Michael J. Timle is denied.

(5193-010199)

May 8 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

U.S. Constitution: Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AFFIDAVIT/APPLICATION FOR SEARCH WARRANT

STATE *OF* MISSOURI)
) ss.
COUNTY OF CLAY)

I, Detective Terence Carter, Affiant and applicant herein, being duly sworn, appears now before the undersigned Judge authorized to issue Warrants in criminal cases and makes this Affidavit and Application in support of the issuance of a Search Warrant, to search the following described person, place or thing:

8428 **N.** E. 109' Place, Kansas City, Clay County Missouri.

> It is a gray with white trim single family residential structure. It is the fourth structure south of Wallace on the west side of 109th Place. The numbers "8428" are clearly marked on the front of the residence.

and to there search for and ***seize,*** photograph or copy, and make return thereof, according to law, the following property or things:

Marijuana, a Schedule I Controlled Substance;
Any weapons;
Currency;
Any and all equipment used to further drug transactions and/or deter law enforcement effectiveness;
Any papers, correspondence or documents related to drug trafficking and/or the disposition of monies which are evidence *of* the proceeds from the illicit trafficking of drugs;

Photographs, including still photos, negatives, video tapes, films, undeveloped film and the contents therein, slides, in particular photographs of co-conspirators, of assets, and/or controlled dangerous substances;
Indicia of occupancy, residency, ownership, management and/or control of the premises described above including, but not limited to utility and telephone bills, canceled envelopes and keys;

Affiant and Applicant being duly sworn deposes and states that he has Probable Cause to believe that the above listed property to be searched for and seized, photographed or copied, is now located upon said described person place or thing based upon the following facts, to wit:

In December, *2002,* Detectives from the Kansas City, Missouri, Police Department's Drug Enforcement Unit received narcotics information regarding a subject named Michael Timley, black male, 3-19-1971. The information received stated that Timley, in the past, received large quantities of illegal narcotics and sells the substances in the state of Missouri and the Joplin area.

A computer check of Timley revealed him to be on state probation for he distribution and the manufacturing of a controlled substance out of Clay County, Missouri. Timley ***is*** also a federally convicted felon for the conspiracy to distribute cocaine base.

A Department of Revenue picture was obtained for Michael Timley by Detectives of the Drug Enforcement Unit. Through this picture and numerous surveillances, Timley **was** determined to be residing at the residence located at 8428 N.E. 109' Place, Kansas City, Clay County Missouri, with an unknown white female.

On 3-29-2003, at approximately 1300 hours, surveillance was initiated on the residence located at 8428 N.E. 109th Place. A large blue vehicle, license **864-MCS,** Missouri, occupied by two unknown black males, backed into the driveway of the residence and pulled up to the garage. The driver and the passenger exited the vehicle and entered the residence through the front door. After a few minutes, the driver partially opened the garage door of the residence, opened the trunk of **the** vehicle, and pulled two large heavy gauge black trash bags from the trunk. The driver appeared to be extremely nervous by looking around and the trash bags appeared to be heavy. The driver quickly placed the trash bags in the garage and closed the garage door. Both the driver and the passenger entered the vehicle, and drove away from the area. Through the experience of the Drug Enforcement Unit, it is commonly known that narcotics traffickers transport narcotics in black trash bags for concealment purposes.

A computer check of the license on the vehicle revealed the owner to be Nick Frising, of 3524 Oakridge Drive, Joplin, Missouri.

On 4-9-2003, at approximately 0700 hours, a surveillance was initiated on the residence located at 8428 N.E. 109th Place. This was found to **be** the normal trash collection day for the area surrounding the residence. Several large white trash bags were observed abandoned next to the curb directly in front of the residence, apparently intended for collection by the Waste Management Department. The white trash bags were recovered and transported to a safe location for inspection. Found inside the bags were miscellaneous documents in the name of Lacey Gimlin of 8428 N.E. 109" Place, Kansas City, Missouri. Also found in the

white trash bags were eleven clear plastic bags containing a green leafy residue substance believed to be marijuana. A large heavy gauge trash bag, matching the description of the one that was placed in the residence on 3-29-2003, was found in the white trash bags. This black trash bag contained numerous green stems and was full of a green leafy substance believed to be marijuana. The green leafy substance field tested positive for the presence of THC, the active ingredient in marijuana. The listed evidence was packaged, sealed, signed, dated and placed in the Unit vault for later transfer to the Property and Evidence Unit On 4-16-2003, at approximately 0630 hours, a, surveillance was initiated on the residence located at 8428 **N.E.** 109th Place. This was found to be **the** normal trash collection day for the area surrounding the residence. Timley was observed exiting 8428 N.E. 109th Place, through the front door, carrying several large white trash bags. Timley placed the. bags next to the curb apparently intended for pickup by the Waste Management Department. Timley then walked back to the residence and entered through the front door. The white trash bags were recovered and transported to a safe location for inspection. Found inside the bags were miscellaneous documents in the name of Lacey Gimlin of 8428 N.E. 109" Place, **Kansas** City, Missouri. Also found in the white trash **bags** was a large amount of a green leafy substance believed to **be** marijuana. The green leafy substance field tested positive for the presence of THC, the active ingredient in marijuana. The listed evidence was packaged, sealed, signed, dated and placed in the Unit vault for later transfer to the Property and Evidence Unit.

/s/ Anthony Bolognia
Assistant Prosecutor

/s/ Terrance Carter
Detective, KCMOPD
Affiant and Applicant

Subscribed and Sworn to me this 17th day of April 2003 at the hour of 8:55 AM.

/s/ Judge Sutton

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEARCH WARRANT

THE STATE OF MISSOURI TO *ANY* PEACE OFFICER IN THE STATE OF MISSOURI

WHEREAS, on this 17th day of April, 2003, Application for Issuance of a Search Warrant and Affidavit(s) in writing, duly verified has been filed with the undersigned Judge of this Court, stated that heretofore the following described property is subject to seizure, to-wit:

Marijuana, a Schedule I Controlled Substance;
Any weapons;
Currency;
Any and all equipment used to further drug transactions and/or deter law enforcement effectiveness;
Any papers, correspondence or documents related to drug trafficking and/or the disposition of monies which are evidence of the proceeds from the illicit trafficking of drugs;
Photographs, including still photos, negatives, video tapes, films, undeveloped film **and** the contents therein, slides, in particular photographs of co-conspirators, of assets, and/or controlled dangerous substances;
Indicia of occupancy, residency, ownership, management and/or control of the premises described above including, but not limited to utility and telephone bills, canceled envelopes and keys;

and it further appears that there is **PROBABLE** CAUSE to believe that said property subject to seizure is being kept or held in this county and state on the following person, place or thing, to-wit:

8428 N. E. 109th Place, Kansas City, Clay County Missouri. It is a gray with white trim single family residential structure. It **is** the fourth structure south of Wallace on the ***west*** side of 109th Place. The numbers "8428" are clearly marked on the front of the residence.

NOW THEREFORE, IN THE NAME OF THE STATE OF MISSOURI, I command that you search the person, place or thing above described within **10** days after filing of the Application for issuance of this Warrant, by day or night, as soon as practicable, and to take with you, if need **be,** the power of your county, and, if said above described property, or any part thereof, be found on said person, place or thing, that said property be seized or photographed, or copied and returned, or the photograph or copy, be brought to the **Judge,** who issued the Warrant to be dealt with accordingly to ***law.*** That you make a complete and accurate inventory **of** the property so taken **by** you in the presence of the person from whose possession the same is taken, if that be possible, and ***to*** give to such person a Receipt for such property, together with a copy of the Warrant, or, if no person can **be** found in possession of said property, leaving said Receipt and copy of said Warrant at the sight of the search. **After** execution of the Search Warrant, the Warrant with a Return thereon, signed by the officer making the search, shall be delivered to the Judge who issued the Warrant, together with an Itemized Receipt for said property taken.

WITNESS my hand and the SEAL of this Court on this 17th day of April 2003 at the hour of 8:55 AM.

/s/ Judge Sutton
Judge

County of Clay, State of
Missouri

RETURN/RECEIPT FOR SEARCH WARRANT

I, Detective Steve Campo, being a peace officer in and for the county of Clay , State of Missouri, do hereby make Return / Receipt of the attached Warrant as follows:

That on the 17th day of April, 2003, and within 10 days after filing of the Application for Issuance of Search Warrant, I went to the person, place or thing described in said Warrant and searched the same for the property described, and that upon said person, place or thing I discovered the following property described in said Warrant which I then and there took into my possession: (list property taken)

I .Green leafy substance.
2. Misc papers, SSN paperwork, checking paperwork, bank statements.
3. Bank Midwest, SSN card in the name of Lacey Marie Gimlin.
4. Brown/Beige purse contents, Visa card, SWB card, J.C. Penny card.
5. Legal pad pages, store receipts, bank receipts.
6. $207.00 U. S. currency recovered from brown purse in N.W. bedroom.
7. $1,900.00 U.S. currency recovered from the floor in N.W. bedroom.
8. Rental paperwork, Insurance , Probation, Credit Union, Bank Express Mail paperwork.
9. Paperwork, planner, telephone bill paperwork, water bills, Sprint Bills.
10. Motorola electronic address book.
1 I. Bank.Time Warner Bills, Utility ADT., Insurance Bills.
12. ATT and T phone bills in the name of Michael Timley.

13. Childcare Bank Elite Sport invoice, Time Warner cable statement.
14. Photo's.
15. White address book.
16.Documents- bank statements.
17. $1 0,500.00 U.S. currency.
18. documents photo's, auto repair bills, bank statements, telephone bills
19. Black/Red transport bag.
20. Approx. $1,17,480.00 U.S. currency.

that I made this inventory in the presence of (possessor) the person from whose possession I took said property; that the owner of said property is unknown (that there was no person present from whose possession said property was taken;) that I delivered to said possessor and/or owner a Receipt for the property taken, together with a copy of this warrant (that, there being no person in possession of said property present on said premises, I left a copy of this Warrant with a Receipt for the property taken, in a conspicuous place on said premises); that I have now placed said Search Warrant.

/s/ Det. Steve Campo #3275
PEACE OFFICER

Subscribed and Sworn before me this 21st day of April, 2003.

/s/ J. Holt
CLERK OF THE CIRCUIT COURT

Filed April 21, 2003
Clay County Circuit Court